Employment & Labour Law

2018

Sixth Edition

Contributing Editors:
Charles Wynn-Evans & Emma Byford

glg global legal group

CONTENTS

India

Suhas Srinivasiah & Debjani Aich
Kochhar & Co.

General labour market and litigation trends

Labour laws generally

Employment laws in India are mostly federal, with pan-India application. The applicability of laws varies depending on the categorisation of the employer and the employee. Certain laws apply only to manufacturing establishments, which stand more regulated.

A key criterion to consider is whether an employee is held to be a "workman" under the Industrial Disputes Act, 1947 ("ID Act") or not. Under the ID Act, a workman is generally any employee *inter alia* engaged to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, but would not include an employee engaged in: (a) a managerial or administrative capacity; or (b) a supervisory capacity and drawing wages more than Rs. 10,000 a month. Typically, all employees who are not in a managerial or supervisory role would be considered as workmen. The ID Act prescribes various conditions to be followed in relation to the working relationship of a workman with his employer.

Most states in India have a Shops and Establishments Act ("SEA") which deals with general working conditions such as hours of work, leave, overtime, etc. SEAs are broadly similar in scope, with some variation between States.

India also requires employers and employees to contribute to provident and pension funds (a form of social security benefit) and requires employers to pay eligible employees who have completed the prescribed threshold of five years of continuous employment a gratuity benefit upon cessation of employment.

Payment of compensation for death or disability suffered at the workplace is also applicable across industry sectors.

Labour market and reforms

Given the huge population, availability of labour is *per se* not considered a problem. It is estimated that more than 50% of the population is below the age of 25 years, with a vast majority of this population having completed secondary school graduation.

In the hi-tech industry, India enjoys a highly skilled workforce comprising engineers, researchers, etc., who have contributed to the tremendous growth of this industry.

As a general approach, Indian employment laws are pro-employee and place a high level of compliance on employers. An employer is required to comply with multiple regulations relating to registrations, filing returns, maintaining registers, etc. With several labour laws dating back to the 1930s, it is often quite difficult for an employer to be fully compliant with all legal requirements. Generally, firing employees at will is also difficult as Indian laws

place restrictions/compliances prior to termination of employees. In the manufacturing sector, it is difficult to fire employees if an employer employs workmen over a prescribed threshold and it is also difficult to close establishments without taking prior approval of the concerned Government.

Trade unions are quite common in the manufacturing sector but rarely seen in the services sectors (especially, the IT and ITES sectors).

One of the main standing demands of the business community within and outside India is unification of the various labour statutes and simplification of the compliances. In response, the Government has drafted various labour codes, such as the Industrial Relations Bill and the Code on Wages Bill, which seeks to consolidate various important federal labour laws. In particular, the Industrial Relations Bill seeks to amend and consolidate provisions relating to termination of workmen mentioned below. It is expected that the drafts will become laws in the next few years.

Labour litigation

Litigation in India can be expensive, long-drawn and cumbersome. Employee litigation in India also factors in whether an employee is a workman or not under the ID Act. Litigation in the form of industrial disputes in relation to workmen and the employer usually falls under the ID Act, which has specific adjudicatory bodies. The decision of these bodies can be appealed to the State High Courts and the Supreme Court of India.

The dispute process varies for non-workmen employees, where the cause of action is usually for breach of the employment agreement / employment policies. In such cases, the parties would approach a civil court of competent jurisdiction for relief.

Redundancies, business transfers and reorganisations

Redundancies

Indian employment law does not use the term "redundancy" for employee terminations. In India, the termination of employees, whether large-scale or of a single employee for convenience (and not for cause, such as termination on disciplinary grounds) is held to be either "retrenchment" or "termination of services", depending on the category of the employee, under applicable Indian law.

As mentioned above, the ID Act is the main federal law that regulates industrial relations, including the termination of employees who qualify as "workmen". Under the ID Act, termination of a workman *inter alia* for any reason other than as a punishment by way of disciplinary action is termed as "retrenchment". A company (not being a factory, mine or plantation with 100 or more workmen) needs to follow a specific process and timeline for retrenchment of a workman who has completed one year of service (which is generally considered to be 240 working days) under the ID Act, *viz.*:

(i) provide the workman with written notice of one month with the reason for the retrenchment and wait until the notice period has expired or provide the workman with wages *in lieu* of the notice period;

(ii) pay the workman retrenchment compensation calculated at the rate of 15 days average pay for each year worked or part thereof in excess of six months;

(iii) serve notice of the retrenchment on the concerned State Government/other specified labour authorities in the prescribed State form and *as per* the stipulated timelines.

It is important to note that if the employment contract contains better termination provisions

than provided under the ID Act (such as a longer notice period or higher severance compensation), the employer would be bound to follow the same while retrenching workmen.

The ID Act has various other compliances in relation to retrenchment, such as requiring the employer to ordinarily follow the principle of 'last in, first out' for the workmen being retrenched, and giving a retrenched workman the right to priority in case of any re-hiring.

Termination of a non-workman would take place *as per* the specific employment contract and factoring in the SEA. The employer would need to provide the required notice period or payment *in lieu* of notice (as stipulated in the employment contract) and further comply with other contractual termination-related obligations. There are no statutory reporting requirements in case of termination based on an employment contract for non-workmen.

The SEA would typically apply once an employee has completed a certain time period of employment with the company, pursuant to which termination (other than in case of established misconduct) would need to be on some form of reasonable grounds along with due notice or payment *in lieu* of notice.

In practice, employers frequently offer the "voluntary resignation" route to employees, mainly to avoid the perceived stigma of a termination. Even if an employer offers such route, it should still comply with all compensation requirements, statutory or contractual, such as those due under the ID Act.

In the case of a factory, mine or plantation employing 100 or more workmen, if a workman has completed one year of service (again, 240 working days), the employer needs to comply with the following process for retrenchment:

(i) provide the workman with written notice of three months with the reason for the retrenchment and wait until the notice period has expired or provide the workman with wages *in lieu* of the notice period;

(ii) obtain prior permission of the concerned State Government for the retrenchment; and

(iii) once the Government permission has been obtained, pay the workman retrenchment compensation calculated at the rate of 15 days' average pay for each year worked or part thereof in excess of six months.

Termination due to misconduct

Termination due to misconduct would occur in the event of a breach of the rules of the employer or some objectionable conduct. An employer would typically provide details of acts which constitute misconduct or prohibited conduct in its employee manual / standing orders / appointment letter. There is no specific definition of "misconduct" under Indian employment law, with a federal law, the Industrial Employment (Standing Orders) Act, 1946, referring to certain acts and omissions which will be treated as misconduct. These include:

(a) wilful insubordination or disobedience, whether alone or in combination with others, to any lawful and reasonable order of the employee's superior;

(b) theft, fraud, or dishonesty in connection with the employer's business or property;

(c) wilful damage to or loss of employer's goods or property;

(d) taking or giving bribes or any illegal gratification;

(e) habitual absence without leave, or absence without leave for more than 10 days; or

(f) habitual negligence or neglect of work.

An employer may include further acts which it would hold as misconduct under company policy. There is no prescribed notice period in such a termination but the employer would need to follow a formal disciplinary process and comply with the principles of natural justice to establish the misconduct.

Broadly speaking, in order to prevent the possibility of an employee challenging the termination before a court of law on the grounds of *mala fide* intentions, victimisation, etc., it is recommended that an employer follow the procedure below:

(i) issue a charge sheet to the concerned employee;

(ii) hold a domestic enquiry (a single individual may be appointed as an enquiry officer to conduct the internal domestic enquiry) – the person conducting the enquiry and taking the decision should not be directly involved in the conduct in question and preferably, not the immediate superior of the employee;

(iii) give the employee the chance to provide his defence at the enquiry;

(iv) peruse the report of the enquiry officer; and

(v) issue the disciplinary action.

Usually, in the case of termination due to established misconduct, the employee is not eligible for any severance compensation and would forfeit the right to receive benefits such as gratuity payment.

Business transfers and reorganisation

Generally speaking, if the business, the assets constituting the business and persons substantially involved in the business are transferred, then it would constitute a transfer of undertaking. Under the ID Act, where the ownership or management of an undertaking is transferred, whether by agreement or by law, from the employer to a new employer, the new employer is required to ensure that:

(i) the service of the workmen is not interrupted by such transfer (i.e., continuity of service must be maintained, which is relevant for the provision of certain statutory welfare benefits);

(ii) the terms and conditions of service applicable to the workman after the transfer cannot be less favourable than those applicable to him immediately before the transfer; and

(iii) under the transfer terms or otherwise, in the event of future retrenchment, the new employer is legally liable to pay to the workman severance compensation on the basis that his service has been continuous and not interrupted by the transfer.

If the new employer does not agree to comply with the above conditions, the workmen who have been in continuous service of one year immediately before the transfer are entitled to notice and compensation from the previous employer as if they were being retrenched. Similar principles will apply in case any employees are being transferred in a business reorganisation.

It has been established through judicial precedent that transfer of employment is not automatic and the employer has to obtain the consent of the workmen. If a workman does not agree to the transfer, the employer would either need to retain him or terminate him as discussed above.

Business protection and restrictive covenants

Under Indian contract law, contractual obligations which restrain free trade or profession beyond the tenure of the contract are generally considered void (with the exception of non-compete on the seller of a business).

Thus, a non-compete clause on an employee, restricting his right to join a competitor company post-termination of employment, is viewed as restrictive and void under contract law. However, such clauses are frequently included in employment contracts for their deterrent value. If challenged by an ex-employee, it would be difficult for an employer to defend any such post-termination restrictive clause. Indian courts have upheld, however, that employees can be restrained from breaching trade secrets and confidential information of the previous employer when they start working with a third party / competitor.

The decisions of Indian courts on enforceability of non-solicit clauses in employment contracts are varied. Based on existing case law, there seems to be a reasonable possibility to restrain an ex-employee from soliciting the previous employer's customers. From a practical perspective, it would be difficult to implement a non-solicitation of employee clause, since an employee cannot be restrained from joining a competitor. As in the case of non-compete provisions, non-solicit clauses in relation to both employment and customers are often included in employment contracts.

The position is different for a non-solicitation clause amongst two business entities, which are held to be on somewhat equal footing as compared to an employer-employee relationship where the employee is perceived to be in a lower bargaining position. Courts have upheld non-solicitation clauses amongst two employers while at the same time holding that the employees cannot be restrained from joining a third party for better employment opportunities even if the employers are subject to a non-solicit agreement.

Companies sometimes ask employees to sign retention bonds where the employee agrees to remain with the company for a specified time period. The key factor to consider in such a case is reasonableness, where the employer has incurred costs in providing the employee with some benefit or advantage, such as specialised professional training, in the course of employment, on the premise that the said benefit will be used for the advancement of the employer's business. Again, courts would examine any such restraint carefully to ensure that it is not a blanket restriction on the employee's right to seek alternative work, and the employer would face significant damage if the employee breached the bond. Even in such cases, courts have been careful not to force employees to serve the remaining bond period but have upheld return of the costs incurred by the employer for the training, etc.

Discrimination protection

There are specific laws applicable to private sector companies which prohibit discrimination on various grounds. While the majority of the laws are aimed at non-discrimination against women employees, there is also some protection against disability-based discrimination.

Laws providing protection to women include: (i) the Equal Remuneration Act, 1976, which requires an employer to ensure equal treatment for women at the workplace; (ii) the Maternity Benefit Act. 1961, whereunder an employer cannot discriminate against a woman employee on maternity leave, including terminate her services while on such leave; and (iii) the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, which aims at protecting women from sexual harassment at the workplace.

The Rights of Persons with Disabilities Act, 2016 provides protection to persons with specified disabilities, where a private sector employer is *inter alia* required to have an equal opportunity policy. There is also some protection against discrimination based on medical grounds, such as under the National AIDS Control Organisation, where the Government of India has stipulated that mandatory HIV testing cannot be imposed as a precondition of employment or of providing healthcare facilities during employment. As a general rule

of thumb, there should not be discrimination based on medical grounds other than a case where the medical issue is a definite impediment to the job profile.

The Constitution of India guarantees certain fundamental rights to Indian citizens, including protection against discrimination on the grounds of race, religion, caste and gender. While this protection is available only against the State and its agencies, and does not apply to private companies, as a matter of good corporate practice, most companies have inclusion and diversity policies and do not discriminate on any of the foregoing grounds.

Protection against dismissal

Employees in India are provided with certain rights with regard to protection against dismissal, the ID Act being a prime example. As mentioned above, under the ID Act, in order to retrench a workman who has been employed in continuous service for a period longer than one year, the employer has to follow specific conditions, including provision of notice and payment of retrenchment compensation. The Maternity Benefit Act is another law that provides protection against termination to the woman who is on statutory maternity leave.

Under the ID Act, any dispute or difference between a workman and his employer in relation to any dismissal, discharge, retrenchment or termination of the workman is held to be an "industrial dispute" under the said law. An aggrieved workman has the right to approach the specified judicial authorities under the ID Act to seek specific redressal in relation to such an industrial dispute. Remedies include requiring the employer to follow the concerned ID Act compliances, possible reinstatement of the workman, and payment of damages. The ID Act also prescribes penalties on an employer for breach of the applicable provisions.

A non-workman employee has the right to approach a court of jurisdiction seeking relief in terms of civil damages for wrongful termination. Case law exists to suggest that civil courts will not pass orders regarding reinstating the dismissed employee but may offer relief in terms of monetary damages.

Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)

Working hours and leave are regulated in India through the State SEA for most private sector commercial establishments or through legislation such as the Factories Act, 1948, which applies to factories.

The SEA usually applies to an "employee", without distinction – this would cover any type of employee, full-time, part-time or on probation. Some SEAs have specific exemptions to certain classes of employees, including senior management employees.

The State Government usually specifies opening and closing hours for an establishment. Companies are typically required to be closed for one day a week, which is generally Sunday. Some SEAs have provided exemptions to the said requirements where the service sector requires 24×7 operation, such as the IT/ITES sector. This will entail specific permission to be obtained from the State Government.

A SEA would stipulate the working hours for an employee, averaging between eight to nine hours a day. A break of 30 to 60 minutes is usually provided after four or five hours of work. Any work beyond these limits requires payment of overtime, usually computed as twice the average wages paid to an employee. The SEA may also prescribe overtime caps based on a time period, such as daily or monthly.

Women employees are generally not permitted to work at night (8pm to 6am) for safety reasons. Again, certain State Governments have provided an exemption to specific service sectors, which is granted based on Government approval and is subject to safety and security conditions.

The Factories Act provides for working conditions for factory workers, including aspects such as working hours (a maximum of 48 hours a week or nine hours a day or both), overtime, leave, health and safety compliances, etc.

General leave in private sector establishments is typically regulated by the SEA, wherein an employee is entitled to 15 to 20 days of regular leave and about 10 national or public holidays a year. Some SEAs also allow for sick or casual leave not exceeding 10 days in a year. Carry-forward of the unutilised leave to the next year is also permissible subject to certain prescribed thresholds.

Maternity leave in India is required to be provided in private sector companies under the Maternity Benefit Act, 1961 ("MB Act"), while paternity leave is not mandated under law. There has been an increasing trend in India to now also provide some form of paternity leave. The MB Act *inter alia* provides for paid maternity leave between 12 to 26 weeks to a female employee who has worked for 80 days in the preceding 12 months with the employer. The period of this leave depends on the number of children the female employee has. Paid leave of 12 weeks also needs to be provided to a female employee who is adopting a child less than three months old and to a "commissioning mother" who uses a surrogate for the child. The MB Act also envisages paid leave to be provided in other specified cases, including a medical termination of pregnancy, a miscarriage or pregnancy-related illness, along with payment of a medical bonus in case the employer is not providing any free pre-natal confinement or post-natal care. The MB Act provides for various other employee benefits, including the employer setting up a crèche facility and allowing a female employee to visit her child at such a crèche four times a day. The concept of "work from home" also exists depending on mutual agreement between the employer and the female employee once her statutory paid maternity leave period has ended.

Indian employment law requires an employee to be provided with some form of notice and a reason for the dismissal prior to termination, other than in case of established misconduct. These aspects have been discussed in "Redundancies, business transfers and reorganisations", above.

Under current Indian legislation, whistleblower protection is available only in relation to complaints made against Government agencies, subject to various conditions and exemptions. The Whistleblower Protection Act, 2014 provides protection against victimisation of persons who make complaints relating to disclosures in relation to corruption, wilful misuse of power or wilful misuse of discretion against any public servant, or the attempt to commit/commission of a criminal offence by a public servant.

The position is quite different in the private sector, where there is no single codified umbrella legislation for whistleblower protection. Possible disclosure requirements and related protections have been provided through various laws and guidelines, such as under Indian securities laws, which prescribe a voluntary whistleblower protection policy for listed companies. Such a policy would specify a mechanism which allows the employee of a listed company to report any unethical behaviour, fraud or violation of law and would provide adequate safeguards against victimisation of employees who use the mechanism. However, it is not mandatory for companies to implement the same, which reduces the efficacy of the requirement.

The Companies Act, 2013 has various provisions which deal with the reporting of concerns within the company, such as having a vigil mechanism for specified companies, including listed companies. Such a vigil mechanism is operated through a company's audit committee in case of listed companies. Under the Companies Act, the mandated auditor, cost accountant or company secretary of a company also has a duty to report to the Government in case of any fraud committed against the company by its employees or officers. India's federal bank, the Reserve Bank of India, has a scheme whereby private sector and foreign banks need to implement a whistleblower policy that will protect employees from retaliation (public sector banks are covered under the guidelines of the Central Vigilance Committee).

Worker consultation, trade union and industrial action

Under the ID Act, if an industrial establishment employs 100 or more workmen, the Government (state or central) may require the establishment to constitute a works committee with a maximum of 20 members. The works committee would promote measures for security and good relations between the employer and workmen and mediate or facilitate any material difference of opinion between the said parties.

A trade union may be formed in accordance with the Trade Unions Act, 1926 for regulating relations between an employer and employees. Such a trade union would also work as a collective bargaining mechanism. A trade union can enter into binding contracts and settlements with an employer.

In practice, trade unions usually exist in labour-intensive sectors such as manufacturing, with trade unions not being active in the services sector. The last few years have, however, seen some move towards forming trade unions in the IT sector, which will be an interesting development to watch.

Certain States in India also have laws dealing with trade unions, such as the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 and the Kerala Recognition of Trade Unions Act, 2010.

Employee privacy

While an individual's right to privacy is a fundamental right flowing from Indian constitutional law, as mentioned above, fundamental rights apply only against the State. From an employer-employee perspective, an employee's rights to privacy are covered by the Information Technology Act, 2000, which is the main Indian law dealing with individual privacy. Under the said law, an employer is obligated to keep "sensitive personal data or information" ("SPDI") safe and secure though reasonable security practices and procedures ("RSPP"). From an employer's perspective, SPDI includes an employee's personally identifiable information such as biometric information, medical records, sexual orientation and bank account details.

If an employer is negligent in complying with the requirements of keeping an employee's SPDI secure through RSPP, the employer may be liable to penalties in the form of compensation. The Information Technology Act also places various other compliances on an employer in relation to an employee's SPDI, such as: obtaining consent for transfer to third parties; the employee's right to modify the SPDI or not provide it; having a privacy policy in place, etc.

The IT Act allows parties to agree on the mode of RSPP and accordingly, by way of practice, companies usually have comprehensive privacy policies in place which also provide for the security measures implemented to secure the SPDI.

Other recent developments in the field of employment and labour law

Indian labour laws have witnessed significant changes over the course of the last one year. Certain key amendments have been highlighted below. The Maternity Benefit (Amendment) Act, 2017 increased the duration of maternity leave from 12 to 26 weeks (also mentioned above), with the option to avail of maternity leave eight weeks prior to the expected delivery. Establishments are also required to provide crèche facilities within a prescribed distance of their premises if they employ more than 50 employees, which is a significant development. However, as of date, the Government has not provided details on the modalities of establishing such a crèche, which is causing some confusion for employers.

In December 2016, the Employee's State Insurance Act, 1948 ("ESI Act") was amended, whereby the salary or wages threshold for coverage of an employee was increased to Rs. 21,000/- (approx. US$ 309) or under per month from the earlier wage cap of Rs. 15,000/- (approx. US$ 221) per month. The ESI Act *inter alia* applies to factories and commercial establishments and provides for social security insurance for employees in case of sickness, maternity and employment injury. The amendment led to inclusion of more employees under ESI Act.

In 2015, the Payment of Bonus Act ("PB Act") was amended, which Act applies to factories and establishments which employ 20 or more persons. This law provides for payment of a statutory bonus to eligible employees, which bonus is determined on the basis of profits or on the basis of production or productivity of the establishment. The eligibility limit of an "employee" was amended whereby an employee who earns a salary or wages of Rs. 21,000 (approx. US$ 323) per month is eligible for payment of statutory bonus. This was a steep increase for the earlier salary/wage cap of Rs. 10,000 (approx. US$ 153) per month, thereby widely increasing the extent of coverage of the PB Act. Other changes were made to the said Act, leading to a greater financial implication on an employer.

The Child Labour (Prohibition and Regulation) Amendment Act, 2016 amended the Child Labour (Prohibition and Regulation) Act, 1986. One of the main features of the amendment was the ban on a child working in any occupation, as compared to the earlier prohibition preventing a child from working in specified employments. A child is generally a person less than 14 years old. The penalties for employing a child have been substantially increased. The concept of an "adolescent" has been introduced as a person between 14 and 18 years of age. An adolescent is prohibited from working in specified hazardous occupations and processes (including mines). This amendment law was well-received because of the overriding restriction on employing a child, with the Government's position that the exceptions are required to ensure that India's artisanal and farming work continues while giving a child the right to education.

The Ease of Compliance Rules, 2017 were notified by the Ministry of Labour and Employment earlier this year in February 2017 to ensure the ease of doing business in India. These rules introduced the maintenance of combined registers, thus alleviating the burden on employers and ensuring effective compliance with labour laws by organisations.

Suhas Srinivasiah
Tel: +91 4030 8000 / Email: suhas.srinivasiah@bgl.kochhar.com

Suhas Srinivasiah is a senior partner in the Bangalore office of Kochhar & Co. His main areas of practice include general corporate and regulatory, with special focus on employment law. He has assisted more than 75 multinational companies (including several Fortune 100 companies) in setting up business operations in India, including supporting on employment law aspects such as drafting employment contracts, employee handbooks, various policies relating to the workplace, etc. He has undertaken training for client companies on Indian employment laws and practices, compliance with the Foreign Corrupt Practices Act (USA), Anti-Bribery Act (UK) and the Indian Prevention of Corruption Act. Suhas is a ranked and recommended lawyer in both *Chambers & Partners* and *Asia Legal 500* for the past several years.

Debjani Aich
Tel: +91 4030 8000 / Email: debjani.aich@bgl.kochhar.com

Debjani is a partner with the Bangalore office of Kochhar & Co. She is one of the main lawyers responsible for the firm's employment law practice and she represents some of the world's largest information technology companies in relation to their India operations. Debjani has a special interest in laws dealing with prevention of sexual harassment in the workplace and EEO matters and also serves as the external member of the anti-sexual harassment committees of several clients. She regularly conducts workplace training on employment laws and is a frequent speaker on employment issues at international and national conferences and events. Debjani is a ranked lawyer in the *Legal Who's Who of Employment Law*.

Kochhar & Co.

Kochhar & Co., # 201, Prestige Sigma, No. 3 Vittal Mallya Road, Bangalore – 560 001, India
Tel: +91 80 4030 8000 / Fax: +91 80 4112 4998 / URL: www.kochhar.com

www.globallegalinsights.com

Other titles in the **Global Legal Insights** series include:

- **Banking Regulation**
- **Bribery & Corruption**
- **Cartels**
- **Commercial Real Estate**
- **Corporate Tax**
- **Energy**
- **Fund Finance**
- **International Arbitration**
- **Litigation & Dispute Resolution**
- **Merger Control**
- **Mergers & Acquisitions**

Strategic partner